

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9 St. Albans, West Virginia

PUTNAM COUNTY AGING PROGRAM, INC. 1/

Employer

and

DISTRICT 1199, THE HEALTH CARE AND SOCIAL
SERVICE UNION, SEIU, AFL-CIO 2/

Petitioner

Case 9-RC-17254

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing 3/ was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record 4/ in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 5/
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 6/
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 7/

All full-time and regular part-time personal care providers, certified nursing assistants and client transport drivers employed by the Employer, excluding all other employees, and all professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed

during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **District 1199, the Health Care and Social Service Union, SEIU, AFL-CIO.**

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No. 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **June 18, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **June 25, 1999**.

Dated June 11, 1999

at Cincinnati, Ohio

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director, Region 9

1/ The name of the Employer appears as amended at the hearing.

2/ I am administratively satisfied that the name of the Petitioner which appears on the petition is correct.

3/ The Employer, on the record, objected to the hearing on the ground that its counsel did not have adequate time to prepare and asserted that by conducting the hearing as scheduled the Employer was denied due process. The record discloses that the petition was filed and served on the Employer on May 20, 1999. On May 26, 1999, a "Notice of Representation Hearing" was served on all parties scheduling the matter for hearing on June 3, 1999. On June 2, 1999, the Employer filed a motion to postpone the hearing on the ground that counsel was not retained until May 27, 1999. On June 2, 1999, I denied the Employer's motion to postpone the hearing. Inasmuch as the Employer was provided with proper notice of, and fully participated in, the hearing, at which a complete record was developed, I find that the Employer was not denied due process by the conduct of the hearing as scheduled. *Air Control Products, Inc. of Tampa*, 132 NLRB 114 n. 1 (1961). Accordingly, having found that the Employer was not denied due process or in any way prejudiced at the hearing, I reaffirm my ruling denying the Employer's motion to postpone the hearing.

4/ Although given an opportunity to do so, the Petitioner did not file a brief. The Employer timely filed a brief which I have carefully considered in reaching my decision.

5/ At the hearing, the Employer moved to adjourn in order to present additional testimony, or in the alternative to leave the record open to allow it to submit an affidavit on its establishment and structure prior to its corporate realignment and change in its method of operations in 1985. The Employer maintains that such evidence with respect to its establishment and prior operations is necessary to enable me to determine whether it is exempt from the Board's jurisdiction as a political subdivision of the State of West Virginia. The hearing officer denied the Employer's motions and closed the record. The Employer did not renew its motions in its post-hearing brief.

In my opinion, the evidence which the Employer sought to present concerning its establishment and previous method of operations would not materially assist in determining whether it is exempt from the Board's jurisdiction as a political subdivision of West Virginia. Thus, assuming *arguendo*, that the Employer was once an exempt political subdivision, such a finding would not be determinative in view of the change in its method of operations in 1985, of whether it is currently an "employer" within the meaning of Section 2(2) of the Act. In *St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988), the Board addressed a similar issue. In *St. Paul*, the Board, in asserting jurisdiction, held that the fact that the employer was once an exempt political subdivision was not controlling since it was no longer, after a change in its operations, an administrative arm of the state or administered by individuals responsible to public officials or the general public. *St. Paul Ramsey Medical Center*, 291 NLRB at 758. Accordingly, the hearing officer's rulings, including the denial of the Employer's motions to adjourn the hearing or to leave the record open for the submission of an affidavit, are hereby affirmed.

6/ The Employer, a nonprofit corporation, provides nutritional and in-home health services to the elderly in Putnam, Kanawha, Fayette, Boone and Clay counties in West Virginia. Contrary to the Petitioner, the Employer contends that under Section 2(2) of the Act it is exempt from the Board's jurisdiction as a political subdivision of the State of West Virginia.

Pursuant to the provisions of Chapter 31, Article 1, Section 28 of the Code of West Virginia, the Employer, as it currently exists and operates, was incorporated on September 5, 1985. According to the Articles of Incorporation, the Employer was established as a charitable organization to coordinate, maintain, support and manage a comprehensive program for senior citizens. The services provided by the Employer are designed to meet the physical, social, educational, psychological and economic needs of those persons eligible to receive services.

The Employer is authorized and empowered to receive grants and gifts by bequest and to apply for special grants from federal, state, regional and county agencies as well as private foundations or other funding sources. The corporation is comprised of 30 members, initially consisting of the 15 members, including the 5 incorporators, of the Putnam County Senior Council, which was essentially the Employer's predecessor, and 15 other members selected by the incorporators. The incorporators also appointed the members to the first board of directors which, according to the Articles of Incorporation, was to be comprised of 15 members. However, the record discloses that over the years the number of members serving on the board of directors has varied. It is currently comprised of 17 members, but has functioned with as few as 4 legal members. The board of directors appoints an executive director to run the Employer's day-to-day operations. The executive director may also nominate new members to the board of directors subject to the board's approval. In addition, the board has the authority to nominate, renominate and approve board members.

In addition to overseeing the day-to-day operations of the Employer, the executive director is vested with the authority to determine the conditions of employment for the employees. It is not clear whether the executive director needs the approval of the board of directors to implement or change working conditions. The board of directors has recently selected a new executive director (unknown), who has not yet assumed his position. The Employer is currently being operated on a daily basis by acting interim executive director, Dr. Robert Parkins. There is apparently no oversight or review by any state or county agency of the wages and benefits established by the Employer for its employees. Although the Employer receives most of its funding from various federal and state agencies, such governmental entities have no input and do not review the Employer's approximately \$3.2 million annual budget. Moreover, the Employer's expenditures apparently are not reviewed by any governmental agency. However, the Employer provides services pursuant to contracts with various governmental agencies and certain funds are designated for specific programs.

The Employer holds title to its primary office facilities in St. Albans, West Virginia. However, it does not pay real estate taxes and in the event it defaults in its operations the property will revert to Putnam County. In addition to its St. Albans facilities, the Employer utilizes certain centers located throughout its coverage area which are owned by Putnam County.

The Employer holds title to the vehicles used in its operations. Moreover, the Employer may be sued, or may initiate lawsuits, in its own name. Indeed, the record discloses that the Employer has been sued on a number of occasions and has entered into settlement agreements to avoid litigation. The employees are paid with checks drawn on the Employer's account and the Employer deducts the required payroll taxes which are submitted to the Federal Government under the Employer's name and account number. The Employer has a \$165,000 line of credit with a banking institution located in Putnam County, West Virginia, from which it covers payroll and other expenses. Finally, the Employer's employees are not eligible to participate in the state employee retirement program.

Although it appears that the services provided by the Employer were at one time furnished by Putnam County Senior Council, an entity operated by the Putnam County Commission, the County, except for providing certain funding, is no longer directly involved in providing the services offered by the Employer. Moreover, there is no evidence that any federal, state or county agency, except for providing and designating the use of funds, has any direct control over the Employer's operations. Likewise, except for being incorporated as a tax-free charitable organization, with its initial members consisting of the former board of the Putnam County Senior Council, there is no evidence that any governmental entity or public officials participated in the establishment, or currently participates in the operations, of the Employer. Finally, there is no record testimony that the Employer was established to operate as part of any governmental entity.

In *Management Training Corporation*, 317 NLRB 1355 (1995), the Board held that in determining whether to assert jurisdiction over an employer with close ties to a governmental entity it would consider only whether such employer meets the definition of "employer" in Section 2(2) of the Act and the applicable monetary jurisdictional standards. In determining whether an entity is an exempted "employer" within the meaning of Section 2(2) of the Act, the Supreme Court established a two-prong test set forth in *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971). In *Hawkins County*, the Supreme Court held that for an employer to qualify as an exempt political subdivision under Section 2(2) of the Act, it must be either (1) created as a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or the general public.

The Employer concedes that it is not administered by individuals responsible to public officials or the general public. However, the Employer maintains that it was established as a department or administrative arm of a governmental entity and is, therefore, exempt from the Board's jurisdiction under the first prong of the *Hawkins County* test. Based on a careful review of the record, I disagree. Although the Employer is a nonprofit charitable corporation which receives most of its funding from federal and state sources, there is no evidence that it was established in 1985 as a department or arm of a governmental entity. *Management Training Corporation*, supra. To the contrary, the record discloses that the Employer was established as an independent nonprofit charitable corporation to provide certain services to senior citizens. In carrying out its mission of providing services for the elderly, the Employer has the authority to enter into contracts with governmental entities and even nonpublic service providers. *Resident Home for the Mentally Retarded of Hamilton County, Inc.*, 239 NLRB 3 (1978); *Truman Medical Center*, 239 NLRB 1067 (1978), enfd. 641 F.2d 570 (8th Cir. 1981). Membership on the

Employer's board ' of directors is self perpetuating and, along with its executive director, the board of directors establishes employee terms and conditions of employment and administers the Employer's labor relations policies. For example, the executive director and/or board of directors

determine employee wages and benefits without any input or review by any governmental entity. *Resident Home for the Mentally Retarded of Hamilton County, Inc.*, supra. Moreover, the Employer independently establishes its own budget priorities, based on its funding, without any type of governmental oversight or review. The Employer also owns its primary office facilities and is a legal entity which may sue or be sued in disputes arising out of its operation. *Truman Medical Center*, supra.

Contrary to the assertion in the Employer's brief, the fact that the services provided by the Employer were previously made available by a political subdivision of the State of West Virginia is not determinative of whether the Employer is currently an exempt department or administrative arm of a governmental entity. *St. Paul Ramsey Medical Center*, supra. Moreover, the fact that the Employer is exempt from real estate taxes and provides some services out of facilities owned by the County do not, as suggested by the Employer in its brief, support a conclusion that the Employer is a political subdivision. The cases cited by the Employer in its brief in support of its position do not require a contrary result. In *Camden-Clark Memorial Hospital*, 221 NLRB 945 (1975), the Board found that the hospital was an agency of the city of Parkersburg,

West Virginia. However, unlike here, the hospital in *Camden-Clark* was not even separately incorporated and did not have a separate legal identity apart from the city. Moreover, in *Camden-Clark*, unlike here, the city owned the hospital facility, controlled the hospital's operating budget and controlled and directed the business and administrative affairs of the hospital. Likewise, *Madison Mental Health Center, Inc.*, 253 NLRB 258 (1980), relied on by the Employer, is distinguishable from the subject case. Although the hospital in *Madison County* was separately incorporated, the county board, unlike here, retained significant control over the hospital's day-to-day operations, including its labor relations policies. Moreover, the employer in *Madison County*, unlike here, was established by the county which continued to govern its entire operation.

Based on the foregoing, the entire record, and careful consideration of the arguments of the parties at the hearing and in the Employer's brief, I find that the Employer, which admittedly satisfies the Board's monetary and statutory standards for asserting jurisdiction, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. *Management Training Corporation*, supra; *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, supra. Accordingly, it will effectuate the policies of the Act to assert jurisdiction over the Employer's operations.

7/ The Employer's main facilities, which it owns, are located in St. Albans, West Virginia. However, it apparently provides some services out of centers located in Hurricane, Buffalo and Hometown, West Virginia, which are owned by Putnam County. All of these facilities, including the Employer's main offices in St. Albans, are located in Putnam County, West Virginia. The

Employer also owns a facility in Fayette County, West Virginia, but it is not clear from the record

whether it offers any services out of this location. The record does reflect, however, that the Employer provides various types of services for the elderly and/or disabled in five counties (Putnam, Fayette, Kanawha, Boone and Clay) in West Virginia. The services consist of nutritional programs for seniors and disabled persons on a home-delivery basis or at central nutrition sites within the Employer's geographical area. In addition, the Employer provides training, retraining and supplemental employment in two counties to senior citizens on a Medicaid

level of income. Finally, in Putnam County, the Employer provides home health care services to the elderly who would otherwise have to be placed in nursing homes. In carrying out its mission,

the Employer employs approximately 60 employees in various job classifications in the unit found

appropriate. There is no history of collective bargaining affecting any of the Employer's employees.

The parties stipulated, and I find, that all full-time and regular part-time personal care providers, certified nursing assistants and client transport drivers employed by the Employer, excluding all other employees and all professional employees, guards and supervisors as defined in

the Act, constitute a unit appropriate for the purposes of collective bargaining. Accordingly, I shall direct an election among the employees in such unit.

The record discloses that the acting interim executive director, Dr. Robert Parkins, and the recently appointed unnamed full-time executive director have the authority to hire, discharge, reward or discipline employees or to direct their work in a manner requiring the exercise of independent judgment and are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit.

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